Supreme Court, U. S.
FILED
AUG 1 1978
MICHAEL RODAK, JR., CLERK

78-641

IN THE

SUPREME COURT OF THE UNITED STATES

D. ALWYN STIVERS & WALTER B. CHERRY,
Petitioners

vs.

STATE OF MINNESOTA, MINNESOTA STATE BAR ASSOCIATION, HENNEPIN COUNTY DISTRICT COURT, JUDGE STANLEY D. KANE, GARY FLAKNE, AS HENNEPIN COUNTY ATTORNEY AND WARREN SPANNAUS AS STATES ATTORNEY GENERAL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October 9, 1978

INDEX

	Page
GROUNDS	2
Nature of proceedings	2
Statute being attacked	2
Pertinent dates	3
Act of Congress which confers jurisdiction ..	3
QUESTION PRESENTED	3
AUTHORITIES INVOLVED IN THIS CASE	4
STATEMENT OF CASE	4
Concise statement of facts ...	4
Basis for federal jurisdiction	8
ARGUMENT FOR ALLOWANCE OF WRIT ..	8
CONCLUSION	13
INDEX TO APPENDIX	15
JUDGMENT OF U.S. DISTRICT COURT .	1a
APPENDED PORTION SOUGHT TO BE REVIEWED	2a

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I.

GROUNDS

1.1 The nature of the proceedings

This is a civil rights action for an injunction and declaratory judgement against the harassment under color of law, the enforcement - by state officials and their agents - of the Minnesota Statute purporting to regulate the unauthorized practice of law within the state by actions, including actions brought by private legal organizations, causing such chilling effect as to deprive petitioners of their rights, privileges, immunities and protections afforded by the United States Constitution and its progeny.

1.2 The statute being attacked

Petitioners claim that Minnesota State Statute 481.02, Unauthorized Practice of Law, is unconstitutional as applied to

their activities.

1.3 Pertinent dates relative to this petition

This is an appeal from an order of the United States Court of Appeals, for the Eighth Circuit, No. 77-1564, filed on May 3, 1978, denying peitioners' request for remand to a three-judge federal court.

1.4 Act of Congress which confers jurisdiction on the Supreme Court

Jurisdiction of the U. S. Supreme Court is invoked under 28 U.S.C.A. 1254 which reads as follows: " Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree".

II.

QUESTION PRESENTED

Whether it was error for the three-

judge court to include the herein petitioners in total dismissal of the lower court action prior to trial and for the United States Court of Appeals, for the Eighth Circuit, to decline to remand this case to the three-judge court with directions to hear petitioners' constitutional claim.

III.

AUTHORITIES INVOLVED IN THIS CASE

The natural rights and privileges of petitioners Stivers and Cherry have been abridged by the refusal of the federal judiciary to hear their grievances; such refusal constitutes summary deprivation of the protection of the 1st, 6th, 9th, and 14th amendments to the United States Constitution.

IV.

STATEMENT OF THE CASE

4.1 Concise statement of facts

Petitioners Cherry and Stivers are

members of Divorce Education Association, an association of people who gather together for the purpose of sharing information and ideas of teaching eachother the rudiments of process and procedures of the court functions. In addition, the Association provides a forum within which members can espouse their beliefs and ideas about the divorce system and a place to work together to effect legislative changes relating to the matter of divorce.

In March 1974, the Minnesota State Bar Association (MSBA) commenced a civil suit in the Hennepin County District Court of Minnesota against Charles T. Thibodeau, Donna Thibodeau and Divorce Education Associates, INC., a defunct non-profit corporation (and different from the above " Association"), charging the unauthorized practice of law.

In February 1975, the MSBA attempted

to amend its action against the Thibodeaus by adding as defendant, Divorce Education Association, an unincorporated non-profit association, in which the Thibodeaus, Stivers, and Cherry are members. The Bar Association's attempt to amend was denied.

In April 1975, the MSBA initiated a new law suit against Divorce Education Association. Again this attempt to involve Divorce Education Association and its members, including petitioners Stivers and Cherry failed in dismissal without prejudice of the suit. Hence, the state court left the door open for future suits against Stivers and Cherry.

Petitioners Stivers and Cherry joined the Thibodeaus in commencing this suit in October 1975 prior to the state court trial, which commenced January 5, 1976. Petitioners requested the state court proceedings be enjoined and that a three-judge court be empaneled to hear their

federal question.

On December 10, 1975, the federal court injunction was denied by Judge McManus and a three-judge court was empaneled.

The state court proceedings came to judgement on the single issue of whether or not the Thibodeaus' activities within Divorce Education constituted the practice of law; deciding that the activities were the practice of law and that they violated the pertinent Minnesota Statute.

As a consequence of this, Divorce Education Association elected to suspend its operations pending determination of the herein issues to preclude sacrificing any more members to the state official police powers. Members are afraid to exercise their desire to assemble and carry on their mutually beneficial association.

On May 11, 1977, Thibodeaus' appeal to the Minnesota Supreme Court was dismissed

for lack of prosecution.

4.2 Basis for federal jurisdiction in the court of first instance

(a) Jurisdiction is conferred by Act of Congress, 28 U.S.C. Sect. 1331, 28 U.S.C. Sect. 1343, and damages are authorized by 42 U.S.C. Sect. 1983, and the Declaratory Judgement Act, 28 U.S.C. Sect. 2201 .

(b) Temporary restraining orders and preliminary injunctions are authorized by Rule 65, Federal Rules of Civil Procedure, 28 U.S.C. Sect. 2283, and 28 U.S.C. Sect. 2284 (3) .

V.

ARGUMENT FOR ALLOWANCE OF WRIT

Functionally speaking, it was wrong for the court below to dismiss the good-faith and meritorious petition for the redress of grievances. Petitioners Cherry and Stivers' perception of the meaning of the lower courts'

determinations that the prevailing circumstances preclude their cause from being accorded a hearing by the three-judge federal district court are characterized by this dialogue:

1. Thibodeau is sued in state court.

2. Plaintiff (the Minnesota State Bar Association) said to state court: Cherry and all others who are members of Divorce Education Association are engaged in the same activity and we charge them accordingly asking that the Association (Cherry, Stivers, et al) be included as defendants in this state proceeding.

3. State Court to MSBA: I will not accept as co-defendants in this law suit any of the other members of Divorce Education Association.

4. Cherry to State Court: I will not volunteer to be prosecuted at the state level regarding the legality of my activities as a member of DEA.

5. State Court to Cherry: Your activity in DEA will not be adjudicated at this time by this court.

6. Federal Court to Cherry: Your co-worker Thibodeau has been sued in State Court. As a fellow-member of his in DEA and engaged in the same activity you must await the consummation of those proceedings before we will entertain your constitutional claims.

7. Cherry to Federal Court: I prefer to have the constitutionality of my DEA activities determined by the Federal Court. In addition, I was excluded by the State Court in becoming a co-defendant in the activities for which my co-member Thibodeau was being prosecuted in the State Court prior to my filing suit in Federal Court.

8. Federal Court to Cherry: Thibodeau will nevertheless have to exhaust his State Court remedies before we will hear

your constitutional claims.

9. Cherry to Federal Court: Thibodeau's remedies have been exhausted. The State Supreme Court has dismissed his appeal.

10. Federal Court to Cherry: Thibodeau's remedies at the State Level were not exhausted due to his failure to prosecute.

11. Cherry to Federal Court: I have no deficiencies to be remedied before the State Court, therefore I am entitled to be heard in Federal Court regarding the constitutionality of my activities in DEA.

12. Federal Court to Cherry: You are not entitled to be heard in Fedral Court regarding the constitutionality of your activities in DEA because Thibodeau failed to exhaust his remedies in the State Court.

Petitioners Cherry and Stivers do not believe that the law of the land endorses court procedures that get a person into a corner like that with respect to his

rightful access to the Federal Courts.

Petitioners believe also that there is yet an attendant issue of exceedingly great scope, which opens to this Court the opportunity to have the Federal Courts manifest an official concern for the securing of the constitutionally protected rights of the members of divorced or divorcing families to assemble together amd to assist one another in securing those rights.

Petitioners Stivers and Cherry believe that the activities they engaged in as members of Divorce Education Association, including their mutual relationship to the paid members Thibodeaus (whose law suit in defense against the Minnesota State Bar Association is referenced throughout this file) are entitled to Constitutional protection.

In the light of the traditional role of the respondents in the lives of

divorced families in Minnesota and of the extensive material of the petitioners on on file herein that is related to the origins and purpose of Divorce Education Association, there exists --- petitioners believe --- a natural conflict which mitigates against petitioners being judged by any of the respondents or their associates at the state level within the context of a legal determination.

Petitioners reiterate their continued belief that the threat of the application of Minnesota Statute 481.02 as applied to their activities by the respondents in this law suit mandates a federal determination as to their legality.

VI.

CONCLUSION

Wherefore, petitioners Cherry and Stivers

--- believe that the lower court has erred in its application of the cases cited

as reasons for not remanding to the three-judge court,

—— and that this error concerning the principles of federalism and comity becomes a practical threat to the stability of family life in Minnesota,

—— and they urge upon the Court the remanding of this case, that this cause on behalf of family life in America be neither lost in the corridors of case history nor sacrificed to the decadence in camaraderie.

Dated, St. Paul, Minnesota,

October 9, 1978

Respectfully submitted,

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Petitioners Pro Se

APPENDIX

JUDGEMENT OF U.S. DISTRICT COURT 1a

APPENDED PORTION SOUGHT TO BE REVIEWED 2a

Order No. 77-1564 of the United States Court of Appeals, for the Eighth Circuit, filed on May 3, 1978 .

UNITED STATES DISTRICT COURT
for the
District of Minnesota- Fourth Division

Civil Action File No. 4-75-550

Charles T. Thibodeau, et al

vs. JUDGMENT

State of Minnesota, et al

This action came before the Court, Honorable Edward J. McManus, Roy L. Stephenson and Myron H. Bright, United States District Judge.

It is Ordered and Adjudged that judgment of dismissal is hereby entered.

Dated at Minneapolis, MN., this 30th day of March, 1977 .

Harry A. Sieben,
Clerk of Court

Cynthia Bentzen, Deputy

United States Court of Appeals

for the Eighth Circuit

No. 77-1564

D. Alwyn Stivers and
Walter B. Cherry,

Appellants

v.

State of Minnesota; Minnesota State Bar Association, a Minnesota Corporation; Hennepin County District Court; Stanley Kane as District Court Judge for the Hennepin County District Court; Gary Flakne, as County Attorney for the County of Hennepin; and Warren Spannaus as Attorney General of the State of Minnesota,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: April 24, 1978

Filed: May 3, 1978

Before GIBSON, Chief Judge, VOGEL, Senior Circuit Judge, and HENLEY, Circuit Judge.

VOGEL, Senior Circuit Judge.

Appellants D. Alwyn Stivers and Walter B. Cherry appeal the order of a three-judge district court dismissing their amended complaint.

We briefly summarize the history of the case. On March 16, 1974, the Minnesota State Bar Association (Bar Association) filed a suit in Minnesota district court against Charles T. and Donna Thibodeau, Divorce Education Associates, Inc., and various"John Does". [1] The Bar Association sought to enjoin the defendants from engaging in the unauthorized practice of law in violation of Minn. Stat. 481.02 (1976), and to compel the repayment of all monies received for legal counselling.

---

1. The various "John Does" made no appearance in the action and were apparently not served with process.

The defendants defended, inter alia, on the ground that 481.02 was unconstitutional. The Bar Association subsequently attempted to amend its complaint to include Divorce Education Association, an entity which was apparently separate from the named defendant Divorce Education Associates, Inc., but the court held that Divorce Education Association was not amenable to suit. [2]

On October 29, 1975, while the state court action was pending, the Thibodeaus and appellants Stivers and Cherry filed an action in federal district court [3] against the Bar Association, the state

2. The Bar Association also initiated a separate action against Divorce Education Association, but the action was dismissed on the ground that the latter was not amenable to suit.

3. After all of the judges in the district of Minnesota disqualified themselves because of their membership in the Minnesota State Bar Association, the action was assigned to the Honorable Edward J. McManus,

district court and district court judge, the State of Minnesota, the Attorney General of the State of Minnesota, and the Hennepin County Attorney. The complaint alleged, inter alia , that the plaintiffs were members of Divorce Education Association and that the action pending in the state court threatened the plaintiffs' continued involvement in that Association in deprivation of their constitutional rights. The action sought a temporary restraining order against the state proceedings, a declaration that 481.02 was unconstitutional, an injunction against its enforcement, and damages.

On December 10, 1975, the federal district judge denied plaintiffs' request for a temporary restraining order and requested that a three-judge panel be convened pursuant to 28 U.S.C. 2284 (1970) (amended 1976). The three-judge

court was convened on December 22, 1975.[4]

The state court trial commenced on January 5, 1976, before District Court Judge Stanley Kane. The trial concluded on February 10, 1976, and on May 12, 1976, Judge Kane issued his decision concluding that 481.02 was constitutional, and finding that the defendants had engaged in the unauthorized practice of law. In a detailed order, Judge Kane enjoined the defendants from engaging further in the

3.(cont'd) Chief Judge, United States District Court, Northern District of Iowa.

4. The three-judge court ultimately consisted of Judge McManus and Judges Myron H. Bright and Roy L. Stephenson of the United States Court of Appeals for the Eighth Circuit.

activity found to constitute unauthorized practice. Judge Kane also enjoined certain activities of Divorce Education Association, although the latter was not a party to the suit. [5] The Bar Association's request for reimbursement of legal fees was denied. A timely appeal was taken by the defendants from this decision to the Supreme Court of Minnesota. The Supreme Court of Minnesota subsequently dismissed the appeal for lack of prosecution.

---

5. Judge Kane enjoined advertising by Divorce Education Association through its representatives Charles T. and Donna Thibodeau on the theory that the Thibodeaus represented the Association and aired all of its diverse interests in defending the action.

After the state district court decision was filed, the federal court plaintiffs below sought to amend their complaint to add allegations of conspiracy under 42 U.S.C. 1985 (3) (1970) and bad faith prosecution, and to request that Judge Kane's order be enjoined and set aside. On September 9, 1976, the three-judge district court, in a well-reasoned opinion, issued an order (1) granting the plaintiffs' motion to amend, and (2) dismissing the complaint as amended. Thibodeau v. State of Minnesota, 419 F. Supp. 87 (D. Minn. 1976) vacated for a new order sub nom., Stivers v. Minnesota, 97 S. Ct. 1090 (1977). The court noted that Judge Kane had given consideration to all of the constitutional arguments urged by the plaintiffs in the federal action and had ruled adversely to them on each point. The dismissal was grounded on the principles of

federalism and comity set forth by the Supreme Court in Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). [6] Stivers and Cherry appeal the order of dismissal.[7]

6. Younger and Samuels established that when a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time the federal complaint is filed, principles of equity, comity, and federalism preclude federal injunctive or declaratory relief against the challenged statute unless bad faith enforcement or other special circumstances are demonstrated. In Huffman, the Supreme Cpurt determined that Younger principles applied to state proceedings which, although not strictly criminal in nature, were in aid of or closely related to the state's criminal statutes and sought to protect the interests underlying its criminal laws.

7. Stivers and Cherry initially filed an appeal with the United States Supreme Court. On February 22, 1977, the Supreme Court remanded the cause to the district court for the entry of a new order from which a timely appeal could be taken to this court, citing MTM, Inc. v. Baxley, 420 U.S. 799 (1975). Stivers v. Minnesota, 97 S.Ct. 1090 (1977).

As we read their brief, appellants, who are appealing pro se, contend that the three-judge district court erred in applying Younger principles to them because they were not named parties in the state court action. They also argue that state court remedies have been exhausted and that the principles of comity and federalism no longer apply. We reject both arguments and affirm.

Ordinarily, persons not subject to ongoing state proceedings may seek declaratory relief, Steffel v. Thompson, 415 U.S.452 (1974), or a preliminary injunction, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), in federal district court against the threatened enforcement of an allegedly unconstitutional state statute without meeting the requirements of Younger . However, the Supreme Court has indicated that in some circumstances

the comity considerations of Younger will apply to parties seeking relief in federal court, even though no state proceedings are pending against them by name. Hicks v. Miranda 422 U.S. 322, 348-49 (1975); Allee v. Medrano, 416 U.S. 802, 831 (1974) (Burger, C.J., concurring). Such a case may arise where the interests of the parties seeking relief in federal court are closely related to those of parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings. Hicks v. Miranda, supra. But cf. Doran v. Salem Inn, Inc., supra (where three corporations had similar business activities but were unrelated in terms of ownership, control and management, state proceedings against one of the corporations did not bar the other two corporations from seeking preliminary injunctive relief in federal court).

Before the three-judge district court, appellants made no attempt to distinguish their interests from those of their co-plaintiffs, the Thibodeaus, who were state court parties.[8] Rather appellants' pleadings indicate that their interests and the interests of the Thibodeaus are closely intertwined. They alleged that they are co-members with the Thibodeaus in Divorce Education Association; appellant Stivers and Donna Thibodeau are on the board of directors, and appellant Cherry and Charles T. Thibodeau are employees of the Association. The only standing to challenge 481.02 demonstrated by appellants arises from the alleged impact that

8. In responding to the defendants-appellees motions for dismissal, appellants and the Thibodeaus pursued the theory that they should come under the "extraordinary circumstances" exception to the Younger bar. Younger v. Harris, 401 U.S. 37, 45 (1971).

Judge Kane's injunction issued against the Thibodeaus, and Divorce Education Association, will have on appellants as members of the Association. Further, appellants sought by their federal action to interfere with the state proceedings; they requested a stay of the state proceedings in their original complaint, and a temporary and permanent injunction against Judge Kane's order in their amended complaint. Under these circumstances, the three-judge district court correctly applied the principles of Younger to appellants, even though they were not named as parties in the state proceedings.

The appellants' second contention is that state court remedies have now been exhausted and that therefore the principles of comity and federalism which barred the district court from considering the case no longer exist. In support of their argument, they attach to their brief a

photocopy of the Minnesota Supreme Court order dated May 11, 1977, dismissing the state court appeal for lack of prosecution. [9] They request that we remand the cause to the three-judge district court for proceedings on the merits.

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9. We would ordinarily not consider this claim on appeal as it was not before the district court. See Wilson v. United States 554 F. 2d. 893,894 (8th Cir. 1977), cert. denied, ____ U.S. ; Morrow v. Greyhound Lines, INC., 341 F. 2d. 713, 724 (8th Cir. 1976). The procedure available to the appellants to test this claim would be under Federal Rules of Civil Procedure 15(d) and 60 (b) . However, the appellees concede in their brief the facts necessary to decide the question posed and we think no useful purpose would be served by subjecting the appellants to the additional time and expense of proceeding in federal district court to determine it.

In Huffman v. Pursue, Ltd., supra, 420 U.S. at 609, the Supreme Court stated:

> Federal post-trial intervention in a fashion designed to annul the results of a state trial, ... deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction ....
>
> **********
>
> (W)e do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that Younger standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.

The Supreme Court also indicated that parties involved in state proceedings may not avoid the standards of Younger by failing to comply with the procedures of perfecting an appeal within the state judicial system. Id. 611 n. 22 .

But cf. Wooley v. Maynard, 97 S. Ct. 1428 (1977) (where relief sought was wholly prospective, and federal suit was in no way designed to annul the results of a state trial, fact that party had not appealed state convictions did not bar federal court from granting preliminary injunctive relief). Although appellants were not named as parties in the state proceedings, they share an identity of interests with the state court parties and sought identical relief. We think that the principles set forth in Huffman v. Pursue, Ltd., supra, and discussed by the three-judge district court in its opinion, 419 F. Supp. at 90, militate against allowing appellants to avoid the Younger bar through the failure of their co-plaintiffs to prosecute an appeal within the state court system. Therefore, we decline appellants' request for remand.

Affirmed. A true copy. Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

Supreme Court, U. S.
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STATE OF MINNESOTA; MINNESOTA STATE BAR ASSOCIATION, a Minnesota corporation; HENNEPIN COUNTY DISTRICT COURT; STANLEY KANE, as District Court Judge for the Hennepin County District Court; GARY FLAKNE, as County Attorney for the County of Hennepin; and WARREN SPANNAUS, as Attorney General of the State of Minnesota,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Statement of Facts	4
Reasons for Denying the Writ	7
The Doctrine of Younger v. Harris is Controlling	7
I. The Court Of Appeals Was Clearly Correct In Affirming The District Court's Dismissal Of This Action Under The Doctrine Of *Younger v. Harris*	7
II. The Failure Of The Defendants In The State Court Action To Prosecute Their State Appeal Precluded The Court Of Appeals From Remanding The Case To The District Court	10
III. Petitioners' Contention That They Should Not Have Been Dismissed By The District Court Because They Were Not Named Defendants In The State Court Action Is Without Merit	12
Conclusion	17

TABLE OF AUTHORITIES

PAGE

Cases:

Allee v. Medrano, 416 U.S. 802 (1974) 15

Anonymous v. Ass'n of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975) 9

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 14, 15

Goodrich v. Supreme Court of State of South Dakota, 511 F.2d 316 (8th Cir. 1975) 9

Grandco Corp. v. Rockford, 536 F.2d 197 (7th Cir. 1976) 9

Hicks v. Miranda, 422 U.S. 322 (1975) 14

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 7, 8, 9, 10, 11, 12, 16

Juidice v. Vail, 430 U.S. 327 (1977) 9

Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974) 9

MTM, Inc. v. Baxley, 420 U.S. 799 (1975) 3

Minnesota State Bar Ass'n. v. Divorce Education Associates, Inc., et al., No. 47155 (Minnesota Supreme Court, May 11, 1977) 6

Minnesota State Bar Assoc. v. Divorce Education Associates, Inc., et al., No. 402526 (Hennepin County District Court, May 12, 1976) 4, 5, 13, 15

Samuels v. Mackell, 401 U.S. 66 (1971) 7

Snelling v. Radford, 243 U.S. 46 (1917) 9

Stivers v. Minnesota, 429 U.S. 1084 (1977) 3, 6

Stone v. Powell, 428 U.S. 465 (1976) 16

Theard v. United States, 354 U.S. 278 (1957) 9

Thibodeau v. State of Minnesota, 419 F. Supp. 87 (D. Minn. 1976) 3, 6

Trainor v. Hernandez, 431 U.S. 434 (1977) 7, 8, 9, 16
Younger v. Harris, 401 U.S. 37 (1971) 6, 7, 8, 9, 11, 13, 15

Statutory Provisions:
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2201 ..... 2, 3
42 U.S.C. § 1983 3
Minn. Stat. § 481.02 (1976) 3, 4, 5, 7, 9, 12, 13
Minn. Stat. § 481.02, subd. 8 (1976) 8
Minn. Stat. § 519.29 (1976) 5

Secondary Authorities:
Note, Developments In The Law, Section 1983 And Federalism, 90 Harv. L. Rev. 1133 (1977) 16
Vestal, *State Court Judgment As Preclusion In Section 1983 Litigation In A Federal Court,* 27 Okla. Law Review 185 (1974) 16

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STATE OF MINNESOTA; MINNESOTA STATE BAR ASSOCIATION, a Minnesota corporation; HENNEPIN COUNTY DISTRICT COURT; STANLEY KANE, as District Court Judge for the Hennepin County District Court; GARY FLAKNE, as County Attorney for the County of Hennepin; and WARREN SPANNAUS, as Attorney General of the State of Minnesota,
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ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is reported at 575 F.2d 200 (8th Cir. 1978).

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was filed on May 3, 1978, and the mandate issued on May 30, 1978. On July 18, 1978, petitioners attempted to file a petition for Writ of Certiorari. It was rejected, apparently because of a failure to abide by Supreme Court printing requirements. On November 1, 1978, the respondents received notice that the petition for Writ of Certiorari had been docketed as of August 1, 1978. The jurisdictional basis is 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should this Court review the decision of the United States Court of Appeals for the Eighth Circuit holding that the district court was correct in dismissing this case on the basis of *Younger v. Harris*, 401 U.S. 37 (1971) and progeny?

STATEMENT OF THE CASE

Procedural History

Petitioners D. Alwyn Stivers and Walter B. Cherry sued the Minnesota State Bar Association, the State of Minnesota, the Hennepin County District Court, Hennepin County Judge Stanley D. Kane, Hennepin County Attorney Gary Flakne and Minnesota Attorney General Warren Spannaus (hereinafter respondents; pursuant to 28 U.S.C. § 2201 and 42 U.S.C.

§ 1983, seeking declaratory and injunctive relief and damages from respondents on the ground that the Minnesota unauthorized practice of law statute, Minn. Stat. § 481.02 (1976), was unconstitutional.

Stivers and Cherry, as well as two other individuals, Charles and Donna Thibodeau, all members of the Board of Directors of the Divorce Education Association, filed suit in federal court against the respondents on October 29, 1975. The respondents moved to dismiss, and on September 9, 1976, a three-judge panel dismissed the plaintiffs' Complaint. *Thibodeau v. State of Minnesota*, 419 F. Supp. 87 (D. Minn. 1976). Although Charles and Donna Thibodeau did not appeal from that decision, Stivers and Cherry prosecuted an appeal. On February 22, 1977, this Court vacated the judgment of the three-judge panel and remanded the case for the entry of a "fresh order" so that an appeal could be taken to the Eighth Circuit Court of Appeals. *Stivers v. Minnesota*, 429 U.S. 1084 (1977).[1] On March 30, 1977, the district court entered a new judgment of dismissal pursuant to the court's previous Order of September 9, 1976. Petitioners Stivers and Cherry, two of the four original plaintiffs, appealed to the United States Court of Appeals for the Eighth Circuit and on May 3, 1978, the Eighth Circuit affirmed the decision of the district court, 575 F.2d 200 (8th Cir. 1978). The case is now before this Court on the petition for Writ of Certiorari filed by petitioners Stivers and Cherry.

---

[1] In its brief order this Court cited MTM, Inc. v. Baxley, 420 U.S. 799 (1975). In Baxley, the Court held that an appeal to the Supreme Court from a three-judge panel does not lie where interlocutory or permanent injunctive relief has been denied and there has been no resolution of the merits of the constitutional claim presented.

Statement of Facts

Petitioners Stivers and Cherry, as well as Charles and Donna Thibodeau, are all members of the Board of Directors of a group calling themselves the Divorce Education Association. In March, 1974, the Minnesota State Bar Association filed suit in state court against Charles and Donna Thibodeau, the Divorce Education Associates, Inc., and various "John Does" alleging that they were engaged in the unauthorized practice of law in violation of Minn. Stat. § 481.02 (1976). Although there is apparently a technical distinction between Divorce Education Association and Divorce Education Associates, Inc., they are seemingly comprised of the same people and in the Complaint which was filed in the instant case, plaintiffs did not allege any distinction between the two groups.[2]

The case in state court was tried for over one month in early 1976 before Hennepin County District Court Judge Stanley Kane, one of the respondents herein. Subsequently, Judge Kane, in a lengthy and comprehensive opinion, found in part that the defendants in the state action had engaged in the unauthorized practice of law by assisting persons in preparing legal documents responsive to other pleadings; counselled persons involved in marital dissolution litigation as to their individual rights and as to the manner and method of filing legal documents; and that all of these activities were done for profit "by doing business as and through Divorce Education

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[2] The Bar Association ultimately also attempted to sue the Divorce Education Association but the Minnesota state district court held that it was, in effect, not amenable to suit since "to permit the [MSBA] to bring in the Association would be similar to permitting a plaintiff suing a department store to bring in the store's customers as defendants." Minnesota State Bar Association v. Divorce Education Associates, Inc., et al., No. 702526 (Hennepin County District Court, Order dated Feb. 5, 1975).

Associates, Inc., and Divorce Education Association during the years 1971, 1972, 1973, 1974, and 1975." *Minnesota State Bar Association v. Divorce Education Associates, Inc., et al.*, No. 702526. (Hennepin County District Court, May 12, 1976), Order at 3.[3] The Court further determined that the Minnesota statutes in question[4] were constitutional and, in a detailed order, enjoined the defendants therein from engaging in the unauthorized practice of law "on behalf of any person, firm, corporation or association." Order at 7. The court's injunction was carefully drawn and the court emphasized that it

> enjoined only that portion of defendants' conduct which is clearly subject to state regulation as the practice of law—the rendering of legal services and advice to a particular individual with respect to personal, specific questions or problems. Unfettered by the Court's injunction is defendants' right to assemble to exchange ideas and voice opinions pertaining to divorce, claimed incompetency within the legal profession or any other matter of concern to them.

Id. Memorandum of Law at 10.

The Court found that the members of the Divorce Education Association "receive legal counsel on a personal basis relating to specific legal matters." *Id.* Memorandum of Law at 10. The court determined that Charles and Donna Thibodeau were doing business as Divorce Education Association and that although the Association was not technically a party to

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[3] The Order and accompanying Memorandum of Law are included in the original record as filing no. 41. The Eighth Circuit Court of Appeals ordered this case heard on the original record.

[4] Minn. Stat. §§ 481.02 and 518.29 (1976).

the lawsuit, the Thibodeaus occupied the status of "representatives of the Association and that their defense of this action aired all relevant diverse interest affected by the action." *Id.* Memorandum of Law at 16.

The lawsuit in the instant case was filed in federal district court by the Thibodeaus and petitioners herein Stivers and Cherry in October, 1975 while the state case was pending. They sought an injunction against the state court trial; a declaration that the Minnesota unauthorized practice of law statute was unconstitutional and damages. The federal district court refused to enjoin the state court proceedings and ultimately dismissed the action based on the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) and progeny. *Thibodeau v. State of Minnesota,* 419 F. Supp. 87 (D. Minn. 1976), *vacated for a new order sub nom,* Stivers v. Minnesota, 429 U.S. 1084 (1977).

In the state court proceeding, defendants therein commenced a timely appeal but chose not to pursue it and the appeal was ultimately dismissed by the Minnesota Supreme Court for lack of prosecution. *Minnesota State Bar Ass'n. v. Divorce Education Associates, Inc., et al.,* No. 47155 (Minnesota Supreme Court, May 11, 1977).

REASONS FOR DENYING THE WRIT

THE DOCTRINE OF YOUNGER V. HARRIS IS CONTROLLING.

I. The Court Of Appeals Was Clearly Correct In Affirming The District Court's Dismissal Of This Action Under The Doctrine Of Younger v. Harris.

The Court of Appeals was unquestionably correct in upholding the district court's dismissal of this action based on the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. The initial posture of this action in federal district court included a request by petitioners herein for an order enjoining the ongoing state court proceedings. Although that particular request for relief is moot at this point, it is clear that this action remains a vehicle for the petitioners by which they seek to circumvent proceedings in the state appellate process. Petitioners' request for an order from the district court declaring Minn. Stat. § 481.02 (1976) unconstitutional and enjoining its enforcement served no purpose other than to invite the federal district court to intervene with the legitimate activity of the state judicial system.

The doctrine of *Younger v. Harris* firmly establishes that federal courts should not intervene in state court proceedings either by way of injunctive or declaratory relief except under extraordinary circumstances. *See Samuels v. Mackell*, 401 U.S. 66 (1971). While this rule was originally established in cases where federal intervention was sought in ongoing state criminal proceedings its application has been expanded to include civil proceedings. *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

In *Huffman v. Pursue, Ltd.*, this Court held that the *Younger* principles applied to an action for civil relief sought by the state against an operator of a theater displaying pornographic films since the action was closely related to a criminal prosecution. This Court reasoned that the state court defendant had an adequate remedy at law in the state forum; that the state courts were proper forums for the airing of constitutional principles; and that principles of federalism and comity mandated deference to the state court proceedings.

This Court, in *Trainor v. Hernandez, supra*, further broadened the application of the *Younger* rule to bar federal interference with strictly civil proceedings which were not of a quasi-criminal nature. In *Trainor*, the Illinois Department of Public Aid, pursuant to the Illinois Attachment Act, had sought civil remedies in state court against Welfare recipients who had allegedly received improper welfare payments. The defendants filed suit in federal court seeking a declaration that the Attachment Act was unconstitutional. This Court held that the principles of *Younger* applied because of the "eviscerating impact" which federal intervention would have on state enforcement actions. 431 U.S. at 446.[5]

It is thus clear that the *Younger* rule does not depend upon whether the state court proceedings are labelled "criminal" or, as in the case here, "civil." Rather, application of the doctrine depends upon the degree to which federal interference in state court proceedings would be destructive of the concepts upon which the *Younger* rule is based, i.e., equity, federalism and comity. As the *Younger* Court observed, the re-

[5] This Court further observed that the state officials could have proceeded criminally, although this fact was not critical to the ultimate decision. 431 U.S. at 444. In the instant case, the Minnesota unauthorized practice of law statute provides for both criminal and civil enforcement. Minn. Stat. § 481.02, subd. 8 (1976).

luctance to enjoin or otherwise impede the progress of a state court action is based upon

> . . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, supra, 401 U.S. at 43-44. *See Juidice v. Vail,* 430 U.S. 327 (1977); *Grandco Corp. v. Rockford,* 536 F.2d 197 (7th Cir. 1976); *Anonymous v. Ass'n of the Bar of the City of New York,* 515 F.2d 427 (2d Cir. 1975); *Goodrich v. Supreme Court of State of South Dakota,* 511 F.2d 316, (8th Cir. 1975); *Lynch v. Snepp,* 472 F.2d 769 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974).

In the instant case, federal intervention would unquestionably be destructive of the concepts of equity, comity and federalism and therefore application of the *Younger* rule is mandated. This is particularly true since the act in question, Minn. Stat. § 481.02 (1976), establishes both civil and criminal remedies against the unauthorized practice of law. Furthermore, regulation of the practice of law is a matter of the highest concern to the State of Minnesota and its citizens. The fact that the regulation of the practice of law is uniquely a function for the individual states has been explicitly recognized by this Court. *See Theard v. United States,* 354 U.S. 278 (1957); *Selling v. Radford,* 243 U.S. 46 (1917). Certainly the regulation of the practice of law is as important to Minnesota citizens as the pornography law in *Huffman* and the welfare fraud law in *Trainor* were to those respective states.

II. The Failure Of The Defendants In The State Court Action To Prosecute Their State Appeal Precluded The Court Of Appeals From Remanding The Case To The District Court.

Petitioners assert that since the state court proceedings have now been terminated, the principles of *Younger v. Harris* no longer apply. Their contention is based on the fact that the Minnesota Supreme Court dismissed their appeal on May 11, 1977, for lack of prosecution.

However, in contrast to petitioners' assertion, their obvious attempt to circumvent the state appellate process further demonstrates why the decision of the court of appeals was clearly correct. In *Huffman v. Pursue, Ltd., supra*, as noted above, the state brought nuisance proceedings against an operator of a theater displaying pornographic films. In that case, the operator, a state court defendant, did not appeal the state court judgment and instead filed a federal action seeking declaratory and injunctive relief in the federal district court. In federal court he argued that he failed to appeal on the grounds that such an appeal would be futile in light of previous state court decisions. The Supreme Court held that the defendant's failure to exhaust his state court appellate remedies prohibited the federal court from granting relief. The *Huffman* Court repeatedly emphasized the necessity of exhausting one's state appellate remedies. As the Court observed:

> Even assuming, *arguendo*, that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings.

420 U.S. at 606 (emphasis in original).

> * * *
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> [A] necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*.

420 U.S. at 608. This Court made it clear that the exhaustion requirement was necessary so that state appellate courts would have an opportunity to fully hear and consider a litigant's case since

> it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. . . . In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts.

420 U.S. at 609. And this Court further observed that a litigant could not avoid the standards of *Younger* "by simply failing to comply with the procedures of perfecting its appeal [in state court]." 420 U.S. at 611 n. 22.

In the instant case, the state court defendants chose not to pursue their appeal to the Minnesota Supreme Court. As a practical matter, this is essentially the situation that existed in *Huffman v. Pursue* since in neither *Huffman* nor the instant case were the respective state appellate tribunals given an opportunity to consider the merits of the constitutional claims; an opportunity that the *Huffman* Court deemed to be absolutely critical. The exhaustion requirement of *Huffman* would be a mockery if litigants could so easily circumvent that requirement by merely filing an appeal but then not prosecuting it.

The court of appeals correctly determined that the *Huffman* principles militated against allowing petitioners the opportunity to circumvent the *Younger* strictures by failing to prosecute an appeal.

III. Petitioners' Contention That They Should Not Have Been Dismissed By The District Court Because They Were Not Named Defendants In The State Court Action Is Without Merit.

In their Petition for Writ of Certiorari, petitioners argue that since they were not individually named defendants in the state court action, the federal district court erred in dismissing their Complaint.

However, a review of petitioners' lengthy Complaint in the instant case reveals that they never presented to the district court their claim that they occupied a status any different than that of the other plaintiffs in the district court, *i.e.*, the Thibodeaus. Indeed, all of their allegations in the Complaint explicitly delineated the harm which they had jointly suffered. For example, count 1.2 of the Complaint alleges that

> Defendant, Minnesota State Bar Association, acting under color of law, and purporting to be an enforcer of M.S. 481.02, (the Unauthorized Practice of Law Statute) is acting and has acted, in concert with the above named defendants, in an attempt to prosecute an action against the above named plaintiffs, Charles T. Thibodeau and Donna Thibodeau, in the Hennepin County District Court, File No. 702526, *all to the injury and deprivation of rights of the plaintiffs* Charles T. Thibodeau, Donna Thibodeau, *D. Alwyn Stivers and Walter B. Cherry.*

(Emphasis added.)

Stivers and Cherry, in their Complaint, *never* mention or even tangentially suggest that the federal court should treat them any differently than the Thibodeaus.

However, if this Court decides to consider petitioners' new theory, raised for the first time before the court of appeals, of why they should not have been dismissed by the district court, it is clear that a review of the merits of their claims establishes that the Divorce Education Association was, in effect, legally indistinct from the state court defendants. Furthermore, even if it is determined that the Divorce Education Association through Stivers and Cherry are legally distinct from the state court defendants, they are all so closely related as to be bound by the *Younger* strictures.

The Minnesota state court determined that the Divorce Education Association as well as the Thibodeaus and Divorce Education Associates would be enjoined from violating Minn. Stat. § 481.02 (1976).

In effect, the Minnesota court found the Association's interests to be legally indistinct from those of the state court defendants; a conclusion not surprising in light of the fact that Stivers and Cherry along with the Thibodeaus are members of the Board of Directors of Divorce Education Association. The state court determined that the Thibodeaus occupied "the status of representatives of the Association and that their defense of this action aired all relevant diverse interests affected by the action." *Minnesota State Bar Ass'n v. Divorce Education Associates, Inc., et al., supra,* Memorandum of Law at 16.[6] The proper remedy at that juncture of the case, if petitioners disagreed with the state court decision, was to prosecute an appeal to the Minnesota Supreme Court or otherwise challenge

[6] Furthermore, as noted above, in their Complaint and at the district court herein, Stivers and Cherry actively joined with the Thibodeaus in an attempt to enjoin the state court action.

the court's order in state court. Bringing the issue directly to the federal forum was in direct contravention of the *Younger* strictures.

Significantly, in their own pleadings at the district court, Stivers and Cherry did not allege any distinction between Divorce Education Association and Divorce Education Associates, Inc. and, indeed, repeatedly referred to the Divorce Education Association as the target of the state court action.[7]

Even if Divorce Education Association through Stivers and Cherry is considered to be legally distinct from the state court defendants for the purpose of the federal action, the *Younger* bar is applicable nevertheless.

The fact that a federal plaintiff is distinct from a state court defendant does not allow that plaintiff to escape the *Younger* bar when, as is present here, the interests of the two are inextricably intertwined. *Hicks v. Miranda,* 422 U.S. 332, 348 (1975). In *Hicks,* this Court held that a theater owner, his property holding company, and the theater corporation could not avoid the *Younger* doctrine by challenging a California obscenity statute in the federal courts when state proceedings had already been initiated against two of the theater's employees under the obscenity statute. Such federal intrusion would impermissibly interfere with the state courts so as to offend principles of comity and federalism. *See Hicks v. Miranda,* 422 U.S. at 349. In some situations a federal plaintiff may escape the *Younger* doctrine if similar proceedings have been instituted against a completely unrelated defendant, *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975). However, that situation obviously is not present here.

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[7] *See, e.g.,* petitioners' undated "Memorandum of Law On Behalf of Plaintiffs" filed on about November 14, 1975, and "Plaintiffs' Memorandum" dated November 20, 1975.

In the instant case, it is clear that the interests of Stivers and Cherry are intertwined with the interests of the Thibodeaus, the state court defendants and two of the plaintiffs herein, and thus Stivers and Cherry should not be allowed to avoid the *Younger* bar. The plaintiffs in the federal action (the Thibodeaus and Divorce Education Associates) are so closely related as to be virtually indistinguishable. The central figures in the Divorce Education Associates were the Thibodeaus and it is clear that their representation and interest was equally as significant as for Divorce Education Association. *See Minnesota State Bar Association v. Divorce Education Associates, Inc., et al., supra,* Memorandum of Law at 15-17. Stivers, Cherry and the Thibodeaus were all members of the Board of Directors of the Divorce Education Association. Thus, there was unquestionably an identity for purposes of "control and management." *Doran v. Salem Inn, Inc., supra,* 422 U.S. at 929. Furthermore, as discussed above, Stivers and Cherry joined with the Thibodeaus in the federal district court action seeking not only a declaration that Minn. Stat. § 481.02 be declared unconstitutional but also that the ongoing state proceedings be enjoined on the grounds that they would suffer irreparable injury if the state court case proceeded.

The petitioners' charade whereby they now attempt to disassociate themselves from the state court defendants is an obvious attempt to circumvent the clear applicability of the *Younger* doctrine. Chief Justice Burger rebuked such an attempt in *Allee v. Medrano,* 416 U.S. 802 (1974).[8] Referring to a claim by a union that *Younger* did not apply to it on grounds that it was the members of the union and not the union itself that had been defendants in the state court action, the Chief Justice stated:

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[8] The opinion was a partial concurrence and a partial dissent and was joined in by Justices White and Rehnquist. The majority opinion did not address the Younger issue.

> The same comity considerations apply whether the action is brought in the name of the individually arrested union member or in the name of the union, and there is no inequity in requiring the union to abide by the same legal standards as its members in suing in federal court. . . . Any other result would allow the easy circumvention of Younger by individuals who could assert their claims of First Amendment violations through an unincorporated association of those same individuals if the association is immune from Younger burdens. . . . The requirements of Younger are not to be evaded by artificial niceties.

416 U.S. at 831-33. *See also Hicks v. Miranda, supra.*

Thus, petitioners' claim that they should be able to avoid *Younger* is clearly untenable in light of the considerations that underlie the *Younger* doctrine itself. The interests of the petitioners in the federal claim and those of the state court defendants are absolutely identical. It is obvious that if the *Younger* doctrine can be avoided so easily the state will be severely inhibited and frustrated in effectuating its enforcement procedures, *see Trainor v. Hernandez, supra.* Thus, comity and federalism dictate that petitioners here seek their appropriate redress in the state courts and not in the federal forum.[9]

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[9] It should be emphasized that the petitioners had a full and fair trial on the validity of their constitutional claims in the state court proceedings. The trial lasted over one month and the exhaustive state district court order and memorandum of law both reflect considerable research and analysis. Thus, the relitigation of those claims by way of a section 1983 action in federal court should be barred by *res judicata* and collateral estoppel. *See* Huffman v. Pursue, Ltd., *supra,* 420 U.S. at 606 n. 18; Stone v. Powell, 428 U.S. 465, 493-94 n. 35 (1976); Vestal, State Court Judgment As Preclusive In Section 1983 Litigation In A Federal Court, 27 Okla. Law Review 185 (1974); Note, Developments In The Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1336-37 (1977).

The petitioners have had their day in court. They have attempted, unsuccessfully, to have the federal judiciary interfere with ongoing state proceedings and to relitigate issues decided in state courts. The decision of the court of appeals is fully consistent with decisions of this Court. The decision below in no way conflicts with any other court of appeals' decision of which the respondents are aware. The decision is well-reasoned and does not address issues which warrant further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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